Oriental Wealth (M) Sdn Bhd v Nakano (M) Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO Q–02–256 OF 1998
NH CHAN, ABDUL MALEK AHMAD AND DENIS ONG JJCA
2 MAY 2001

Arbitration *— Stay of proceedings — Application — Dispute as to amount certified in interim certificates — No written notice of dispute, whether dispute valid — Complaints of disconformity with specifications — Whether defendant was willing and ready to to do all things necessary to the proper conduct of arbitration*

By an agreement made between the appellant and the respondent, the latter contracted to carry out and complete the construction of 20 units of detached factory buildings. The respondent issued a letter of demand claiming from the appellant the payment of the aggregate sum overdue under interim certificates No 8, 9 and 10. The letter also gave final notice that unless payment was received within 14 days legal proceedings would be commenced against the appellant. There was no response from the appellant to the letter of demand. The respondent then instituted legal proceeding to recover the payments due. The appellant entered unconditional appearance and applied under s 6 of the Arbitration Act 1952 to stay all further proceedings in the suit. The High Court dismissed the application. The appellant appealed. The issues raised before the court were: (i) whether there was a dispute as to the amounts certified in interim certificates No 8, 9 and 10; and (ii) whether the appellant was and is ready and willing to do all things necessary to the proper conduct of the arbitration. The appellant submitted that they disputed the work done by the respondent in that the factory buildings were not constructed in accordance with the specification and were thus defective. Such a dispute was a dispute as to the amount claimed by the respondent. The respondent admitted the defects in the works and were willing to rectify them.

Held, dismissing the appeal:

(1) The letter of demand gave final notice to the appellant. There was no payment made or reply given; nor was there any other correspondence by the appellant to show that the notice had ceased to be operative, was waived or cancelled while negotiation was under way. Consequently such notice continued to run and there was no need for the respondent to give prior notice to discontinue with the negotiation (see p 17H).

(2) The court found that whatever complaints of disconformity with the specifications were eventually resolved to the satisfaction of both sides so that there could no longer be said to be any dispute as to the defects in the works, the remedial works to be undertaken, who was to carry out and complete them and also be liable for the costs. Until such remedial works had been

carried out by the respondent, it would be premature for the appellant to assert that there was a dispute as to the amount (see p 16A–C).

(3) The was no notice in writing of any dispute given by the appellant. From the date of issuance of the letter of demand to the date of issue of the writ, there was a period of six months, which was more than ample time for the appellant to give such notice (see p 17E–F).

(4) The appellant had failed to demonstrate that they were ready and willing to do all things necessary to the proper conduct of the arbitration (see p 18A).

[**Bahasa Malaysia summary**

Melalui satu perjanjian yang dipersetujui oleh perayu dan responden, responden menerima kontrak untuk melaksanakan dan menyiapkan pembinaan 20 unit bangunan kilang berasingan. Responden mengeluarkan satu surat tuntutan untuk menuntut jumlah agregat tertunda dari perayu di bawah sijil sementara No 8, 9 dan 10. Surat tersebut juga memberikan notis terakhir bahawa melainkan bayaran tersebut diterima dalam jangka masa 14 hari, tindakan undang-undang akan diambil terhadap perayu. Tiada jawapan diberikan oleh perayu terhadap surat tuntutan tersebut. Responden kemudiannya memulakan tindakan undang-undang untuk mendapatkan semula bayaran yang perlu dibayar. Perayu memasuki kehadiran tanpa syarat dan membuat permohonan di bawah s 6 Akta Timbangtara 1952 untuk menangguhkan segala prosiding di bawah guaman tersebut. Mahkamah Tinggi menolak permohonan tersebut. Perayu telah merayu. Isu-isu yang dikemukakan di hadapan mahkamah ialah: (i) sama ada terdapat pertikaian mengenai jumlah yang disahkan dalam sijil sementara No 8, 9 dan 10; dan (ii) sama ada perayu sedia dan sanggup melakukan semua yang perlu bagi pengendalian yang betul bagi timbangtara tersebut. Perayu berhujah bahawa mereka mempertikaikan kerja yang dilakukan oleh responden kerana bangunan-bangunan kilang tersebut tidak dibina mengikut spesifikasi dan oleh itu, rosak. Pertikaiannya tersebut adalah terhadap jumlah yang dituntut oleh responden. Responden mengakui bahawa terdapat kerosakan dalam kerja pembinaan yang dilakukan dan sanggup memperbetulkan kerosakan ini.

Diputuskan, menolak rayuan tersebut:

(1) Surat tuntutan tersebut memberikan notis terakhir kepada perayu. Tiada bayaran dibuat dan tiada jawapan diberikan; juga tiada perutusan surat dari perayu untuk menunjukkan bahawa notis tersebut tidak boleh dikuatkuasakan lagi, telah diketepikan atau dibatalkan ketika perundingan dilangsungkan. Akibatnya, notis tersebut masih beroperasi dan responden tidak perlu

memberikan notis terdahulu untuk memberhentikan perundingan tersebut (lihat ms 17H).

(2) Mahkamah mendapati bahawa apa-apa aduan pelanggaran spesifikasi yang ada telah diselesaikan mengikut kepuasan kedua-dua pihak, oleh itu, tidak boleh dikatakan bahawa terdapat pertikaian mengenai kerosakan dalam kerja-kerja pembinaan, kerja pembaikpulihan untuk dijalankan, siapa yang patut melaksanakan dan menyiapkan kerja-kerja tersebut dan siapa yang bertanggungjawab dalam menanggung kos. Sehingga kerja pembaikpulihan tersebut disiapkan oleh responden, belum sampai waktu bagi perayu menegaskan bahawa terdapat pertikaian mengenai jumlah wang (lihat ms 16A–C).

(3) Tiada notis bertulis mengenai apa-apa pertikaian diberi oleh perayu. Dari tarikh pengeluaran surat tuntutan sehingga tarikh pengeluaran writ, terdapat tempoh enam bulan, tempoh yang lebih dari mencukupi bagi perayu memberi notis sedemikian (lihat ms 17E–F).

(4) Perayu gagal menunjukkan bahawa mereka sedia dan sanggup melakukan semua yang perlu bagi mengikut aturan timbangtara secara betul (lihat ms 18A).]

Notes

For cases on stay of proceedings generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1014–1052.

Cases referred to

Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd [1993] 3 MLJ 309 (refd)

Pitchers Ltd v Plaza (Queensbury) Ltd [1940] 1 All ER 151 (refd)

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)

Legislation referred to

Arbitration Act 1952 ss 2, 6

Arbitration Ordinance (Sarawak)

Appeal from: Civil Appeal No 22–108–97–III (II) (High Court, Kuching)

Benny Zaidy Jalil (*John Shek & Co)* for the appellant.

Albert Tang Yew Liong (*Chew, Jugah Wan Ullok & Co)* for the respondent.

Denis Ong JCA. (delivering judgment of the court): This is an appeal from the judgment of Hj Muhammad Kamil bin Awang J dismissing a summons

in chambers application made by the defendant ('the appellant') under s 6 of the Arbitration Act 1952 ('the Act') for a stay of all further proceedings in Suit No 22–108–97–III (III) commenced by the plaintiff ('the respondent') in Kuching High Court II. We heard this appeal on 9 November 1998 at the conclusion of which both learned counsels were orally informed of our unanimous decision that it was dismissed with costs and that the deposit be paid to the respondent towards the account of taxed costs.

By an agreement in writing dated 18 July 1996 ('the agreement') made between the appellant as employer and the respondent as contractor, the latter contracted to carry out and complete the construction of 20 units of detached factory buildings on Lots 996 to 1015, Block 7, Muara Tebas Land District ('the works') located at the Demak Laut Industrial Park Kuching Sarawak for a contract sum of RM15,250,000.

The agreement was in the format of the Sarawak Public Works Department Form of Agreement. By art 2 thereof, the PWD General Conditions of Contract for use where bills of quantities do not form part of the contract ('the GCC') and the PWD Specifications of Contract were, amongst others, deemed to form and to be read and construed as part of the agreement. Of these, only the form of agreement and the GCC were included in the appeal record. The GCC defined 'Government' or 'Employer' to mean Oriental Wealth (M) Sdn Bhd; 'Engineer' or 'Divisional Engineer' to mean the Managing Director of Oriental Wealth (M) Sdn Bhd or any other person duly authorized and appointed in writing by him for the purpose of the contract; and 'Director of Public Works' to mean the Managing Director of Oriental Wealth (M) Sdn Bhd. These definitions must be taken to have been made in substitution of the definitions of the same terms contained in cl 1 of the GCC, although not expressly deleted. In addition, cll 29(vii), 37 and 38 of the GCC were expressly deleted.

The respondent carried out the works. Interim certificates No 1 to 7 were issued by the appellant's architect namely, Architect Design Practice ('ADP') on diverse dates and payment made belatedly by the appellant were received by the respondent. However, despite repeated reminders, no payment was made by the appellant to the respondent under interim certificates Nos 8 and 9 issued on 9 November 1996 and 19 January 1997 respectively for an aggregate sum of RM2,754,659.27.

On 28 January 1997, the keys to six units on Lots 1010 to 1015 were handed over by the respondent to the appellant who acknowledged receipt by its authorized personnel.

On 2 April 1997, the certificate of practical completion was issued and it certified that practical completion of the works was achieved on 4 February 1997.

On 4 April 1997, the keys to the remaining 14 units on Lots 996 to 1009 were handed over by the respondent to ADP who acknowledged receipt.

On 2 June 1997, the respondent, by its solicitors Messrs Azman, Davidson & Co wrote a letter of demand to the appellant for the payment of the aggregate sum overdue under interim certificates No 8 and 9. The letter also gave final notice that unless payment was received within 14 days, legal proceedings would be commenced against the appellant. A

On 17 June 1997, interim certificates No 10 was issued by ADP for the payment of a sum of RM1,450,800.51 to the respondent. B

There was no response from the appellant to the letter of demand and no payment whatever was received by the respondent under interim certificates No 8, 9 and 10, which altogether added up to RM4,205,459.78.

On 2 December 1997, the respondent instituted Suit No 22–108–97–III (II) in the Kuching High Court to recover the payments due under interim certificates No 8, 9 and 10; alternatively, for damages for breach of contract, and for interest and costs on 20 December 1997. The appellant by its advocates, Messrs John Shek & Co, entered unconditional appearance in the action, and on 15 January 1998, applied under s 6 of Act, by way of summons in chambers supported by an affidavit, to stay all further proceedings in the said suit. A number of affidavits and counter affidavits were filed by the parties, the last of which was affirmed by Chan Chee Khuen was on 15 April 1998. C D

The summons application was fixed for hearing initially on 25 February 1998 but was adjourned until 23 April 1998. At the resumed hearing, learned counsel on both sides put in submissions in writing which were admitted into the court file and formed part of the appeal record. At its conclusion on the same day, the learned judge orally dismissed the application with costs. E

On 25 April 1998, he gave the grounds of his decision in writing.

Site inspections by ADP involving representatives of both parties were held as early as 21 December 1996 with a view to sort out the defects in the works and the measures to rectify them. Final site inspection was fixed for 7 May 1998 in respect of the last 17 units constructed. But it was not known if it was in fact carried out. As at the date of hearing of the appeal, interim certificates No 8, 9 and 10 remain unpaid to the respondent. F G

It is noteworthy here to record that interim certificates No 8, 9 and 10 and the Appendix to the agreement were not included in the appeal record.

So much for the facts and background of undisputed events against which the summons application for stay was made.

The ground stated in the summons application was that the parties had, by agreement dated 18 June 1996, agreed to refer to arbitration the matters in respect of which the action was brought and such other grounds stated in the supporting affidavit of Chan Chee Khuen affirmed on 15 January 1998. H

Section 6 so far as is relevant to the facts and circumstances of this appeal provides thus: I

> If any party to an arbitration agreement … commences any legal proceedings against any other party to the arbitration, … in respect of any matter agreed

> to be referred to arbitration, any 5 party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

In relation to s 6, there appeared to have been common ground before the learned judge that cl 43 of the GCC was an 'arbitration agreement' within the meaning of that expression as defined in s 2 of Act; that suit No 22–108–97–III (II) was a legal proceeding commenced in the High Court at Kuching by the respondent who was also a party to the arbitration agreement; that the appellant was a party to such arbitration agreement and legal proceedings; and lastly that the application was made after the appellant had entered appearance, but before it had taken any other step in the legal proceedings.

Clause 43, so far as is relevant, provides thus:

> Provided always that in case any dispute or difference shall arise between the Employer … and the Contractor, either during the progress or after the completion … of the works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith …, then either party shall forthwith give to the other notice in writing of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed upon between the parties in accordance with and subject to the provisions of the Arbitration Ordinance, and the award of such Arbitrator shall be final and binding on the parties. Such reference, …, shall not be opened until after the completion or alleged completion of the works, unless with the written consent of the Employer … and the Contractor … .

The question for decision was whether or not the application for stay should be granted.

The particular issues between the parties at the hearing before the learned judge and before us were:

(a) whether there was a dispute as to the amounts certified in interim certificates No 8, 9 and 10 or a notice in writing of any dispute given under cl 43;

(b) whether the appellant was and is ready and willing to do all things necessary to the proper conduct of the arbitration.

Both these issues were raised by the respondent. The learned judge considered the issue in (b) first followed by that in (a).

The judge found that:

(a) there was no dispute by the employer, plain and obvious or by way of inference from the evidence, as to the amounts certified in interim certificates No 8, 9, and 10 and that no notice in writing of any dispute was in fact given by the appellant pursuant to the provisions of cl 43:

further, refusal by the employer to pay the certified amounts did not give rise to a 'dispute' under that clause; and

(b) under s 6, the onus was on the appellant (as the applicant) to satisfy the court that at the commencement of the civil suit, it was and still remains ready and willing to do all things necessary to the proper conduct of the arbitration and that the appellant failed to so satisfy the court in the absence of any statement by it in that regard in any of its four affidavits filed in support of its summons application.

On those findings, the judge decided that the application for stay be dismissed with costs to the respondent to be taxed unless agreed.

In arriving at the findings in (a) the judge gave his reasons at pp 20 to 21 of the appeal record thus:

> 14. The plaintiffs claim is for the sum of RM4,205,459.78 being the aggregate sum under payment certificates No 8, 9 and 10. Under cl 35(a) of the General Conditions of Contract it is mandatory that the defendant shall pay the sum in 14 days. In so far as the quantum of the sums is concerned there is no dispute of difference with respect of the plaintiff's claim.
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> 15. Under cl 43, the existence of a dispute or difference is a condition precedent to the right to arbitrate.
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> 16. *The Law and Practice of Commercial Arbitration in England* by Sir Michael J Mustill and Stewart C Boyd (Butterworth, London, 1982) at p 90, referring to undisputed claims:
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> > 'First, an action can properly be brought in the High Court in respect of an admitted claim, even though the contract contains an arbitration clause. The claimant may apply for summary judgment, under RSC O 14, and the defendant cannot either fend off judgment or obtain a stay simply by relying on the arbitration clause; for unless there is a dispute, there is nothing to be referred to arbitration. The same principle applies to a claim which is partly admitted: the claimant is entitled to judgment on the admitted portion, and a stay will be granted as to the remainder.
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> > Where the defendant has not actively admitted the claim, but has so far failed to deny it, it would seem that there is no 'dispute' then in existence, and the claimant not only can but must prosecute his claim by action, rather than by arbitration. Moreover, if he really believes that the defendant is saying nothing because he has nothing to say, he can apply for summary judgment.'
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> 17. In the classic case of *London and North Western Joint Railway Co v JH Billington Ltd* [1899] AC 79 where:
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> > 'A Railway Act confirming a Provisional Order, after empowering the railway company to charge a reasonable sum for certain services rendered to a trader, by way of addition to the tonnage rate, enacted that 'any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of L the other party.' The company having sued the respondents for services under this section, the respondents objected to the jurisdiction of the court on the ground that the matter was one for the arbitrator to determine:

Held: As there had been no difference existing between the parties before the action was brought, the court had the jurisdiction but the arbitrator had not.'

18. From the evidence, there is no dispute as to the amount claimed, and mere refusal to pay upon a claim does not necessarily give rise to a dispute calling an arbitration clause into operation (*Elf Petroleum SE Asia*).

For the finding in (b), the judge stated his reasons at pp 18 to 19 of the appeal record thus:

6. It is clear that under s 6, to succeed in an application for a stay of proceedings the defendant has to satisfy the court that at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. There are a number of case law on this point. In paras 7, 8, 9 and 10 the judge referred to the cases of *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 CLJ 2400 (SC), *Lee Brothers Construction Co v The Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459 (HC), *AR Fernandez & Ors v National Union of Bank Employees* [1986] 2 MLJ 135 (FC), and *San Kong Letrik Sdn Bhd v Lembaga Letrik Negara Tanah Melayu & Anor* [1992] 1 CLJ 190; and in para 11, he quoted *Halsbury's Laws of England*, 4th Ed Vol 2 para 564 as authorities for the statement of the law in his para 6.

Applying the principles to the case, the defendant herein filed four affidavits, all of Chan Chee Khuen's dated 15 January 1998 (annexed to the defendant's application) para 31 (p 8); of 14 February 1998 (encl 22) para 7 (p 2); of 7 March 1998 (encl 35) para f (p 3) and of 15 April 1998 (encl 46) para 12 (p 5). Nowhere in any of the affidavits was it stated that the defendant was, at the commencement of the proceedings, and still remains ready and willing to do all things necessary for the proper conduct of the arbitration.

13. Therefore, the defendant has not satisfied the court on this point, and on this ground alone, the defendant's application is untenable.

A complaint by the appellant which was germane to all four grounds of appeal was the failure allegedly by the judge to take into consideration the contemporaneous correspondence exhibited to the affidavits of both parties. In his brief submission in writing to us, learned counsel for the appellant stated that such correspondence showed clearly that:

(i) (a) the appellant disputed the work done in that the factory buildings were not constructed in accordance with the specifications and were thus defective, (b) Such a dispute, he submitted was a dispute as to the amount claimed by the respondent. He claimed that the respondent admitted the defects in the works and were willing to rectify them (ground 3);

(ii) between the issuance of the letter of demand and of the writ of summons, he contended that the respondent continued to negotiate with the appellant; that there was no prior notice of the respondent's intention to discontinue to negotiate; and that the issuance of the writ had taken the appellant by surprise. As such, his contention was that the appellant had no opportunity to refer the dispute to an arbitrator by giving a notice under cl 43 (ground 2);

(iii) when the writ was issued, the appellant was still willing to let the respondent rectify the defects (grounds 1 and 4). A

Learned counsel for the respondent in his written submission to us responded:

> On point (i), that there was really no dispute but a deliberate attempt by the appellant to create issues to delay payment of the certified sums under interim certificates No 8, 9 and 10. His contention was that complaints of defects in the works and remedial works were relevant only during the defects liability period commencing from the date of practical completion. The only outstanding defective works were those certified by the appellant's architects in Architect's Instruction dated 14 April 1998. The respondent indicated that it was prepared to carry out remedial works for the amount of the retention sum or less if it was given access to the premises and also that the appellant settle the debt outstanding under the three interim certificates. But the appellant denied or delayed access by workmen of the respondent into the premises to remedy the defects. Thus the complaint of defective work was really a sham or an excuse to delay payment to the respondent of the amounts so certified; B C D
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> on point (ii), that cl 43 required a notice of the dispute or difference to be given by the appellant to the respondent. No such notice was given; consequently, cl 43 had not been invoked. He supported the conclusion of the judge that there was no dispute or difference respecting the three interim certificates, and added that the appellant never informed the respondent that those certificates were not in order in any way. Whether or not the appellant was taken by surprise by the issuance of the writ was not a ground for the application for stay. Consequently, he submitted that it was unnecessary to consider that point; E
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> on point (iii), that it is settled by Malaysian case law that the applicant, for a stay under s 6 must, on a point of fact, depose in its affidavit that it was at the time when legal proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration and that there is no such deposition of fact by the appellant in any of its affidavits. F

From these submissions, it was clear to us that if there was any dispute to be referred to arbitration, such dispute was narrowed down to the amounts certified by ADP in interim certificates No 8, 9 and 10. In short, the appellant's attack was directed not on the correctness of the judge's finding in the last full sentence of para 14 that was to say, that there was no plain and obvious dispute targeted on the amounts certified in interim certificates No 8, 9 and 10 respectively which must be taken to have been accepted by the appellant, but directed solely on para 18 quoted above, that was to say that from the evidence, the inference was that there was a dispute as to the amounts certified. G H

From these submissions too, it was clear to us that both parties accepted that there was some work done which did not conform to the specifications. These defects in the works were the subject matter of a technical report dated 18 August 1997 by Veritech Appraisal (Malaysia) Sdn Bhd, an engineering appraisal company employed by the respondent with the acquiescence of the appellant to investigate the defects and to I

propose remedial measures. In its report at pp 176 to 187 of the appeal record, Veritech listed these defects under 4 four headings namely:

(1) defects on reinforced concrete floor slabs;

(2) defects on roof steel trusses;

(3) defects on concrete aprons and perimeter drains; and

(4) defects on premix carriageway.

It made recommendations to remedy such defects and advised that they be dealt with under cl 19 of the GCC which provided for defects after completion. There was no disagreement by either party with the findings and recommendations of Veritech which were implemented by ADP and Jurutera Minsar Consult Sdn Bhd, the consulting engineers employed by the appellant for the works.

On 14 April 1998, ADP issued an Architect's Instruction to the respondent to rectify the defects in architectural, civil and structural works in respect of the units in Lots 1006, 1008 and 1010 following final site inspection of them made on 13 February 1998.

By para 2 of its covering letter to the appellant dated 15 April 1998, ADP informed that in addition to the Architect's Instruction it had also directed the respondent to make good the defects on all the units particularized by Veritech in its report entitled 'Engineering Assessment on Cracks Through Reinforced Concrete Slabs' and urged the appellant to permit access for the respondent to rectify the defects in those units expeditiously.

By paras 3 and 4 of the same letter, ADP requested to the appellant for the third time for access to the other 17 units not later than 21 April 1998 for final site inspection and also for the appellant to dc remedial works. Access for final site inspection was fixed for another date namely, 7 May 1998 stated in the reply dated 15 April 1998 of the appellant's advocates.

Under cl 19 of the GCC, the obligation and liability to make good the defects were on the respondent. The issuance of the Architect's Instruction dated 14 April 1998 undoubtedly made under cl 19 fixed liability on the respondent to make good the defects listed therein in respect of the three units. In respect of the remaining 17 units, it was not known whether final site inspection was actually carried out and if so, whether an Architect's Instruction was issued by ADP for remedial works.

The position as we understood from these submissions and the contemporaneous correspondence was that both parties accepted that there were some work done which did not conform to the specifications. Counsel for the appellant claimed that the respondent admitted the defects in the works and were willing to rectify them. Counsel for the respondent did not deny this. Instead he confirmed that the respondent was prepared to carry out remedial works for the amount of the retention sum or less on two conditions:

(a) that the respondent be given access to the premises; and

(b) that the appellant settle the debt outstanding under interim certificates No 8, 9 and 10.

In the light of the above, we concluded that whatever complaints of disconformity with the specifications there were, were eventually resolved to the satisfaction of both sides so that by 14 or 15 April 1998 (the dates of the Architect's Instruction and the reply of the appellant's advocates) or by 23 April 1998 (the date of resumption of hearing of the summons application) there could no longer be said to be any controversy or dispute as to the defects in the works, the remedial works to be undertaken, who was to carry out and complete them and also be liable for the costs.

Until such remedial works had been carried out by the respondent, certified by ADP to have been completed, measured and the value or amount ascertained in terms of ringgit and sen, it was obvious to us that it would be premature to assert, as counsel for the appellant asserted, that there was a dispute as to the amount. Here we also took into account the respondent's confirmation which covered both liability and quantum for the remedial works to the extent of the retention sum. Exactly what the limit of the retention sum was and whether it would be exceeded by the costs of remedial works were not disclosed as the Appendix to the agreement was not included in the appeal record. Further, ADP had, by the same Architect's Instruction, indicated that the costs of such remedial works would be dealt with where applicable by way of adjustment of the contract sum in accordance with the GCC.

Having regard to the fact that interim certificates No 10 was a penultimate certificate so confirmed by counsel for the respondent at the hearing and also the fact that the certificate of practical completion had been issued, as we saw it, any adjustment of the contract sum could only be made by way of revision of the contract sum (upwards or downwards as the case might be) in the final certificate after settlement of the final accounts — not by way of revising the amounts certified in interim certificates No 8, 9 and 10.

In the premises we found no merit in point (i)(a) and (b) of the submission of counsel for the appellant.

Possession of the site having been handed back by the respondent to the appellant, signified by the handing over of the keys to the 20 units on 28 January 1997 and 4 April 1997 and the defects liability period having expired, it was imperative that the respondent be allowed access to the units once more to remedy the defects. Hence condition (a) of counsel for the respondent. In this connection ADP, as mentioned earlier, had made a specific request to the appellant. However, there was no response from the appellant on this point in their advocates' letter. The appellant alone must shoulder the blame for any delay by withholding access to the units to remedy the defects when there was no longer a dispute by the respondent as to its obligation and liability to do so.

Condition (b) stemmed from non-payment by the appellant to the respondent of the sums overdue under interim certificates No 8, 9 and 10. Vis-a-vis the respondent, we noted that there was no provision in cl 35 or in

the GCC to withhold the issuance by ADP of those certificates named in the Appendix to the agreement for work already done and materials delivered on site by the respondent; or, to withhold payment by the appellant which the respondent was entitled thereunder, which acts the appellant attempted to do by its letters dated 8 April 1997 and 30 April 1997 at pp 129 and 135 of the appeal record. In the case of interim certificates No 8, 9 and 10, payment overdue was actually withheld from the respondent.

Condition (b) was the subject matter of the respondent's suit No 22–108–97–III(II) pending disposal in Kuching High Court II at the time of the hearing of this appeal. Short of the appellant's consent, whether or not there would be prompt settlement of the certified sums depended on whether there was an application for summary judgment taken out by the respondent in the High Court and heard at the same time as the application for stay under s 6, as in the case of *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1993] 3 MLJ 309 at p 312. We declined to comment further on this topic as the only appeal before us was this present one against the dismissal of the appellant's application for a stay under s 6. Vis-a-vis the appellant, as said earlier, under cl 19 of the GCC the obligation and the liability to make good the defects were on the respondent. Hence, no issue of condition (b) arose. The respondent acknowledged such obligation and liability and the Architect's instruction was issued on 14 April 1998. The respondent was duty bound to proceed on the Architect's Instruction in accordance with cl 19.

It was common ground that there was no notice in writing of any dispute given under cl 43. It was plain to us that from the date of issuance of the letter of demand to the date of issue of the writ, there was a period of six months. In our opinion, six months was more than ample time to give such notice, and the appellant could not validly complain of lack of time or opportunity to give such notice. Under cl 43 notice in writing shall be given 'forthwith' to the other party: see *Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151 at p 153. However, its complaint was that the issuance of the writ took them by surprise because the respondent continued to negotiate and gave no prior notice to discontinue. In our view that was not a good excuse. The fact was that the letter of demand was issued and the last paragraph was in explicit terms namely, that 'unless the sum of RM2,752,659.27 … is paid to our client or to us as its solicitors within fourteen (14) days from the date hereof, we have firm instructions to commence legal proceedings against you *without further notice*.' (Emphasis added.)

As we read it, that letter gave final notice to the appellant. There was no payment made or reply given; nor was there any other correspondence by the appellant to show that the said notice had ceased to be operative, was waived or cancelled while negotiations were under way. Consequently, such notice continued to run and there was no need for the respondent to give any prior notice to discontinue with the negotiations.

In the premises, we found no merit in the appellant's submission in point (ii).

Lastly, it was common ground that there was no deposition in the affidavit of Chan Chee Khuen affirmed on 15 January 1998 or in any subsequent affidavits to demonstrate to the judge that the appellant was when suit No 22–108–97–III (II) was commenced and when the exercise of the court's discretion was sought for the grant of a stay that it was ready and willing to do all things necessary to the proper conduct of the arbitration. That was a requirement of s 6 and our Malaysian case law: *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at p 108.

We agreed with the submission of counsel for the respondent on this point. From his brief submission in writing, it was clear to us that counsel for the appellant confused willingness to let the respondent rectify the defects when the writ was taken out with willingness to do all things necessary to the proper conduct of the arbitration. The latter talked of submission to arbitration and compliance with the provision in cl 43 for the appointment of a single arbitrator to be agreed upon between the appellant and the respondent in accordance with and subject to the provisions of the Arbitration Ordinance (Sarawak) now superseded by the Act. Counsel thus missed the point in point (iii) of his submission.

We agreed with the findings of the judge for the reasons given above. It seemed to us more likely than not that the lack of a notice under cl 43 and of a statement of the appellant's readiness and willingness to do all things necessary for the proper conduct of the arbitration under s 6 stemmed from a basic lack of dispute to be referred to arbitration.

In the light of those findings, we were not satisfied that the appellant had complied with all the necessary conditions of s 6 to invoke the jurisdiction of the High Court or of this court to stay the proceedings in suit No 22–108–97–III (II). And as the appellant had not crossed the threshold, we needed to consider no further from here: see the postlude to *Seloga's* case at p 112.

For these reasons stated, we upheld the decision of the judge and recorded our decision as in the opening paragraph of this judgment.

Appeal dismissed.

Reported by Jafisah Jaafar